81-2005

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1981

THERESE BALLET LYNN,

Cross Petitioner,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Respondent.

Cross Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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THE QUESTIONS PRESENTED FOR REVIEW

1. When a university defendant, in a Title VII case, claims that it denied plaintiff promotion because the persons who participated in its review of plaintiff's scholarly works concluded that plaintiff's scholarship was inadequate, does the plaintiff (a) have a right of access to the written record of such review, and to the subsidiary records, if any, on which it was based; (b) have a right to examine the persons who participated in such review; (c) if the university prevents such access or examination is the plaintiff entitled to a legal inference that the results of such access or examination would have been favorable to plaintiff's scholarship and (d) may the trial court treat the university's decision that the plaintiff's scholarship was inadequate as *evidence* as to her scholarship, when the plaintiff was *denied* the right of confrontation and cross examination with respect to the bases of such decision? These important, unsettled, questions of Title VII law should be settled by this Court.

2. When, in a Title VII case, a Court of Appeals finds that the record shows (a) the plaintiff proved a prima facie case and (b) the employer articulated a legitimate non-discriminatory reason for its action, may the Court of Appeals refuse to decide the issue, which had been briefed and argued, of whether the employer's "articulated" reason was a "pretext or discriminatory in its application," and, instead, remand the case for a new trial when (i) the Court of Appeals' opinion states no reason for its failure to decide the issue of pretext and (ii) the record contains no justification for the Court's failure to decide the issue of pretext? The Court of Appeals' unjustified failure to exercise its jurisdiction to decide this issue of pretext so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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The first opinion of the Court of Appeals (Appendix A, *infra*) is not reported. The opinion of the Court of Appeals as amended December 18, and December 28, 1981 (Appendix B, *infra*) is reported at 656 F2d 1337. The December 28, 1981 order denying The Regents of the University of California's (the "University" 's) Petition for Rehearing as to the first opinion and further amending the second opinion (Appendix C, *infra*) is not reported. The order denying the University's Petition for Rehearing as to the second opinion and treating that Petition for Rehearing as a motion to recall the mandate (Appendix D, *infra*) is not reported. The opinion of the district court (Appendix E, *infra*) and its findings of fact and conclusions of law (Appendix F, *infra*) and its judgment (Appendix G, *infra*) are not reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 21, 1981, and amended on December 18, and December 28, 1981. The University's timely petition for Rehearing en Banc was denied on December 28, 1981 and its petition for a Writ of Certiorari was filed within 90 days of that date. This Cross-Petition for Certiorari, under Rule 19.5, is filed within 30 days of the date (March 29, 1982) when Therese Ballet Lynn's ("Lynn" 's) counsel received a copy of the University's Petition for Certiorari. This Court's jurisdiction is invoked under 28 United States Code Sec. 1254 (1).

RULE INVOLVED

Federal Rules of Evidence rule 501 provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, persons, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT OF THE CASE

Lynn sued the University under Title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq.) alleging that the University unlawfully denied her promotion to tenure because of her female sex and French national origin. (C.R. 1)[1]

The University's answer (C.R. 3) denied unlawful employment discrimination. It alleged that it denied Lynn promotion to tenure because the persons who had made, for it, a review of Lynn's scholarly works had concluded that Lynn's scholarship was inadequate.

Lynn sought discovery of the records of such review. The University refused. The Trial Court denied Lynn's motion to order the University to produce them (R.T. 22-24; 604-607). Instead, the District Court issued a protective order shielding the University from producing them (C.R. 15)

Fortunately for Lynn, however, the University had appointed, as a member of a committee to review Lynn's work, Dr. Nicole Marzac, a full professor in Medieval French Literature—Lynn's field—at the University's

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1. "C.R.", "R.T.", "M.D." and "Ex." are references to the Clerk's Record, Reporter's Transcripts, Dr. Nicole Marzac's deposition and exhibits of the trial court proceedings filed in the Court of Appeals.

Davis campus (some 450 miles north of the Irvine Campus where Lynn was employed). Dr. Marzac, who was unacquainted with Lynn (M.D. 18) had a distinguished record. She had, also, formerly been a full professor at Cambridge University and at London University, England. (M.D. 6-7) Dr. Marzac testified that Lynn was eminently qualified for promotion to tenure; that "She is a pioneer in her field." (Ex.23 2nd Doc. p.5) Dr. Marzac testified that a majority of the outside scholars, to whom Lynn's work had been referred, had approved Lynn's scholarship (the Trial Court so found, see Appendix E p. 56) and that "...of the leading authorities, 4 are strongly in favor of Lynn's scholarship as against 2 who are not." (Ex. 23 2nd Doc p.3) Dr. Marzac testified that a letter in Lynn's file by the Dean of the School of Humanities was a "misrepresentation of the evidence" when it stated that "most of the outside scholars do not consider [Lynn's work] to be scholarly." (M.D. 41; Ex. 23 2nd Doc. p. 2-3) Marzac testified that the committee meeting on Lynn's scholarship engaged in sex discrimination.

> "I draw attention to letters of commendation. Herman [a committee member] says that half were written by women...It meant obviously that the commendation letters were less valuable because they were written by women...I was outraged." (M.D. p. 27-29) "I point out that...there are 5 unsolicited letters of appreciation on [Lynn's] papers printed or read. Herman points out that these 5 have been written by women. The committee decides not to enter this remark in the letter...the chairman said it would be taken in bad part...if it came out in the open." (M.D. p. 36).

The University did not cross examine Dr Marzac on her testimony as to Lynn's high scholarship or as to the discriminatory conduct of the committee. It did not present any witnesses who contradicted her testimony.

Instead it took disciplinary proceedings against her for disclosing "confidential" information (R.T. 451). In answer to the University lawyer's question as to why she disclosed "confidential" information Dr. Marzac testified "If an injustice has been committed, I feel I would be a criminal myself in not trying to remedy an injustice." (M.D. p. 73)

The University's petition for certiorari disagrees. It characterized the conscientious Dr. Marzac as a "renegade." (p. 6). (She wouldn't be a party to a "cover up" of sex discrimination.)

University threats of unlawful reprisal coerced a member of another committee, which also considered Lynn's works, into not testifying about the Committee's proceedings.[2]

The Court of Appeals' Opinion bases its decision that Lynn had proved a prima facie case on its conclusions, among other things, that (a) statistical evidence in the record showed "a pattern of academic sex discrimination by the University" (p. 26 *infra*) "the district court noted 'since its founding, Irvine has granted tenure to 26 men and only two women—the last woman granted tenure was

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2. "I cannot say that the Irvine campus would bring disciplinary action against this individual for breaching confidentiality...but there is absolutely no question in my mind that the Irvine campus would have a right to do so and *I would so advise.*" (R.T. 431) (emphasis added)....Mrs. Marx: Title VII protects witnesses and persons who support any charge of discrimination....The Court: That may be a good defense to any disciplinary action but, once again, from what Mr. Lundberg has said, he makes no guarantee that a disciplinary proceeding shall not be brought against her." (R.T. 432—433). 42 USC 2000e-3(a) provides in part: 'It shall be an unlawful employment practice for an employer to discriminate against any of his employees....because he has...testified, assisted or participated in any manner in a...proceeding...under this subchapter."

in 1972." (p. 27, *infra*). (b) "...the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies was not a substantial topic for scholarly work... We do not agree. A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women." (p. 28-29, *infra*).

The University presented *no evidence* that the quality of Lynn's scholarship was defective.[3]

ARGUMENT

A. *The University's claim of "confidentiality," with which the Court of Appeals' opinion inconclusively dealt, involves important questions of Federal law (Title VII) which have not been, but should be, settled by this Court.* The claim has 2 parts.

1. One part is the extent, if any, to which a university's claim of "confidentiality" should shield it from producing *all* the records, and supporting evidence, on which its challenged employment decision was based.

(a)This involves serious issues. How can the university's *intent* be properly evaluated if some of the evidence, on which it acted, is concealed under a claim of confidentiality? Specifically, the record shows that normal practice is for a candidate's publications to be sent to scholars, in the candidate's field, in other universities, for evaluation. Suppose some of such evaluations are favorable and some are not. It would appear that *all* such evaluations plus all analyses of such evaluations, and

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3. Its petition for certiorari p. 6, footnote 3 states: "The University offered no evidence as to the quality of Lynn's scholarship except for the ultimate conclusion reached at the end of the review process that her work did not meet the standard of excellence for promotion to tenure."

recommendations, by university personnel, are relevant in determining whether the chancellor's decision denying promotion was, or was not, based on sex discrimination.

For example, (i) suppose such analyses materially misrepresent, adverse to the woman candidate, the conclusions of the outside scholars as to the high quality of her work? (ii) Suppose, such recommendations, adverse to the woman candidate, were based on sexist standards such as (aa) evaluations by women are of less worth than evaluations by men? (bb) the woman candidate's work on "women's issues" and "women's studies" "are not a substantial topic for scholarly work?" There is uncontradicted evidence that *all* such examples occurred in the case at bench. (See p. 5-8, *supra*). These examples illustrate the necessity for access to the *entire* record, on which the University acted, in order to evaluate whether or not the University's employment decision was based on sex discrimination.

(b) Allowance of the University's claim would be contrary to the intent of the 1972 extension of Title VII to university faculty employment. Such extension has been explained as evidencing a Congressional concern over the "pervasive nature of discriminatory *university* employment practices." *Powell v. Syracuse University* 580 F2d 1150, 1154 (2nd Cir. 1978, emphasis added). Such "pervasive" employment discrimination cannot effectively be eradicated if universities can conceal, under a claim of privilege, the bases for their employment decisions. If, for example, a university is discriminating, its "summaries" and other incomplete forms of disclosure may be artfully designed to conceal evidence of violations of Title VII. Even with full disclosure of the records, interrogation of participants in the university's decision may be necessary to determine whether or not unlawful employment discrimination has occurred. (Dr. Marzac's uncontradicted testimony, in the case at bench, showed

that an *ad hoc* committee decided to omit evidence of sex discrimination against Lynn from the University's record." (See p. 6, *supra*).

(c) Allowance of such claim would be contrary to the principles of *United States v. Nixon* 418 U.S. 683 (1974) which held:

> "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were founded on partial or speculative presentations of the facts." (418 U.S. 709).

Herbert v. Lando, 441 U.S. 153 (1979), held that the principles set forth in *Nixon* are also applicable to claims of privilege in *civil* cases. (441 U.S. at 175).

2. The second part of the University's privilege claim involves the extent, if any, to which a university, at the trial, may rely on *its* decision as *evidence* that the Title VII plaintiff's scholarship was inadequate, *when* the university has refused to permit the bases of its decision to be subjected to confrontation and cross examination, and the Title VII plaintiff was not accorded such rights, despite demands therefor.

(a) Allowance of the University's claim would be contrary to the principles of *Greene v. McElroy*, 360 U.S. 474 (1959) which held invalid a denial of Greene's security clearance (such clearance being a requirement to his holding a job with a defense contractor) because the clearance had been denied, in part, on the basis of "confidential" evidence as to which Greene "was not afforded the safeguards of confrontation and cross examination." (360 U.S. p. 508).

If a district court (a) should refuse to permit a Title VII plaintiff to have access to the evidence on which a university's decision was based, and to examine the persons who participated in such decision, and (b) nevertheless treat the university's decision as *evidence*, in

the Title VII case, that the plaintiff's scholarship was deficient, such actions would violate the principles set forth in *Greene, supra.*

(b) Allowance of the University's claim would be contrary to *Interstate Circuit v. United States,* 306 U.S. 208 (1938) which held, in an anti-trust case:

> "The [defendant's] production of weak evidence when strong is available can lead only to the conclusion that the strong would "have been adverse." (citation) Silence then becomes evidence of the most convincing character (citations)." (306 U.S. at p. 226)

The evaluations of Lynn's publications by scholars in her field, plus the analyses and recommendations which University employees made to the Chancellor are *strong evidence* (a) of the quality of Lynn's scholarship and (b) whether or not the University's decision not to promote Lynn was motivated by sex discrimination. *Interstate Circuit* indicates that the University's refusal to produce such *strong* evidence and, instead, merely produce its adverse decision "can only lead to the conclusion that the strong would have been adverse" to the University.

3. The University's petition exaggerates its need for confidentiality[4] *in Title VII proceedings.*

It seeks to create an *erroneous* impression that faculty

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4. Some employers use other practices. For example: The U.S. Navy, with which one of Lynn's counsel served during World War II and the Korean War, required that any *derogatory* comments put into an officer's "Fitness" report (a report on which personnel actions are based) must be submitted to the officer. The officer had the right to add, to the "Fitness" report, his comment on the criticism. This had two advantages. (a) It enabled the officer to know *exactly* what the criticism was. He could use such knowledge to help guide his future conduct. (b) The officer's comments might assist the Navy Department in evaluating the criticism.

members who are qualified to make evaluations are thin skinned, timid, have back bones like ripe bananas, and are

> "anxious to avoid impairing personal relationships with professional collegues by making candid evaluations." (p. 8, quoting a University manual).

Such assertion ignores the fact that there are competent faculty members who are highly conscientious, who consider truth and justice to be far more important than personal convenience; some of whom are even willing to risk losing their jobs by not remaining silent in the face of what they consider to be a violation of law or an injustice. Dr. Nicole Marzac was one such evaluator. (See p. 7, *supra*). It appears likely that universities, if they try, can find adequate numbers of competent evaluators who place duty above personal convenience.

4. The University's petition disregards the effects of the 1972 amendments to Title VII on the duties of persons participating in university employment decisions. Such amendments, among other things, (a) made sex discrimination *unlawful* in university faculty employment decisions and (b) granted a female plaintiff a right to a *judicial* decision as to whether a university employment decision against her was unlawful.

After 1972, a person who participates in a university faculty employment decision owes a duty *to the United States,* as well as to the university. Such person's duty to the United States is (a) *not* to engage in employment practices made unlawful by Title VII and (b) *if* an employment decision is challenged in Federal court as a violation of Title VII, to give evidence when properly summoned to do so. A university confidentiality rule, obviously, cannot change that.

It is true, as the University's petition asserts, that the giving of evidence as to employment decisions may occasionally be embarrassing, or inconvenient. But oc-

casional embarrassments and inconveniences of witnesses are *inherent* in our judicial system. The Court, in *Nixon,* stated:

> "The need to develop all relevant facts in the adversary system [of justice] is both fundamental and comprehensive" (See p. 10, *supra*).

In re Dinnan, 661 F2d 426, 432 (5th Cir. 1981) expressed the view that the quality of evaluations would probably improve if weak willed persons did not serve as evaluators.

> "If that [requiring an evaluator to testify] means that a few weak willed persons will be deterred from serving in positions of public trust, so be it, society is better off without their services. (See p. 39, *infra*).

5. The University petition's *in camera* proposals, (p. 12) if granted, would violate the standards for *in camera* review set forth in *United States v. Nixon,* 418 U.S. 683, 714 (1974) and violate Lynn's constitutional rights to procedural due process.

(a) In *Nixon* the challenged subpoenas called for tapes of conversations between the President, and his advisers, on specified dates. The tapes, however, admittedly contained conversations which did *not* relate to the alleged criminal conspiracy. Although all the conversations were protected by "presidential" privilege, the Court held:

> "The generalized assertion of privilege must yield to the demonstrated need for evidence in a pending criminal trial." (p. 713).

The District Court, in its *in camera* review was directed to release, to the Special Prosecutor:

> "....material probably admissible in evidence and relevant to the issues of the trial for which it is sought." (418 U.S. at p. 714)

As shown on pages 8-9, *supra, all* of the University records, and supporting data, in the case at bench, on which its challenged employment decision was based, met

the standards for disclosure set forth in *Nixon, supra*. They were:

> "probably admissible in evidence and relevant to the issues at the [Title VII] trial for which...[they] were sought."

An *in camera* review of those documents, accordingly, is unnecessary and improper.

The University's *in camera* proposals violate the "probably admissible in evidence and relevant to the issues" standard laid down in *Nixon, supra*. Instead they would grant the Title VII plaintiff access to the University's papers:

> "*only* when the court....is *first* satisfied that the University's summaries are unfair or inaccurate or that the file contains some evidence of improper discrimination against the plaintiff." (p. 12) (underscoring ours)

(b) Such procedures would violate Lynn's constitutional rights.

(i) The question whether the "university's summaries are unfair or inaccurate" may be an important issue of the case. Lynn is entitled to confrontation and cross examination of *all* the evidence on that issue before the Court decides that issue.

(ii) The proposal that access be denied unless the court "....is first satisfied...that the file contains some evidence of improper discrimination" proposes, in effect, that access be denied unless the file, *on its face*, shows sex discrimination. This is too narrow.

(aa) The records may have been artfully prepared or falsified. A person who is not intimately familiar with the facts may fail to detect violations which the University may be trying to cover up.

(bb) There are many examples where a document, *innocent on its face*, is strong evidence of a violation when other evidence is taken into consideration. The Univer-

sity's proposal that access to the file be denied unless the file shows *on its face* that a violation occurred, seeks to violate Lynn's rights to a fair opportunity to obtain evidence necessary to prove her Title VII case.

The foregoing analysis shows that the scope of the University's "confidentiality" privilege involves important questions of Federal law (Title VII) which have not been, but which should be, settled by this Court.

B. *The Court of Appeals' unjustified failure to exercise its jurisdiction and decide the issue of pretext so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.*

1. The accepted and usual course of judicial proceedings is for appellate courts to decide issues which are properly before them.

This principle was set forth, in 1821, by Chief Justice Marshall, for a unanimous court, in *Cohens v. Virginia* 19 U.S. (6 Wheaton) 264, 404:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given....questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

In the late case of *Alcoa S.S. Co., Inc. v. Nordic Regent,* 654 F2D 147, 170 (2nd Cir. 1981), the opinion stated there is:

> "....a well recognized rule of law that a court possessing jurisdiction had to exercise it unless there were compelling reasons why it should not (citations, including *Cohens*). This appears also to have been the law of England. (citations)."

2. There were no "compelling reasons" why the Court of Appeals should not decide the issue of "pretext."

(a) The Court's opinion did not disclose any. It merely stated:

> "....we would *ordinarily* next determine if the reason 'articulated' by the University was 'a pretext or discriminatory in its application.' However we do not decide that issue here." (Appendix B p. 33, *infra*). (emphasis ours).

In the immediately following paragraph the opinion reached the obvious conclusion that Lynn's due process rights were violated when, immediately after Dr. Marzac's deposition and accompanying exhibits were received in evidence, the University, as a response thereto, offered to the District Court, for *in camera* review, portions of Lynn's tenure review file which the District Court later received and reviewed but refused to disclose to Lynn. Footnote 12 (p 31, *infra*) shows Lynn objected to this.

The rest of the opinion, after the "due process" discussion, was 4½ pages of "some guidance" commencing on page 36, *infra,* for the District Court, on retrial, in ruling on the extent, if any, to which Lynn should have access to the University's files.

(b) The District Court's *in camera* review of the University's tenure review file did *not* deter the University from offering additional evidence on the issue of pretext. In *both* the Court of Appeals and in this Court the University has contended that it *did not intend* that the District Court use the tenure review file as *evidence.*[5] (It wished, in our opinion, to influence the Court with papers which would

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5. The Court of Appeals' opinion, Appendix B page 30, *infra,* states in footnote 11 "...the University argues that the file was neither submitted, accepted, or used as evidence." The University's Petition for Certiorari states "The Court of Appeals....'finding' that the trial court used the file as evidence, rather than for an *in camera* review, is wholly unsupported by the record...." (p.5)

not be subject to confrontation and cross examination).

The record accordingly, presents *no* justification for the Court of Appeals' refusal to decide the issue of "pretext." It clearly shows that the University had presented *all the evidence,* on such issue, which it wished to present.

3. It was "punishing the innocent" for the Court of Appeals to refuse to decide the issue of "pretext" because the *University* induced the District Court to violate *Lynn's* due process rights.

4. The Court of Appeals' refusal to decide the issue of "pretext" will *unnecessarily* increase congestion in Federal courts, weaken enforcement of Title VII and increase costs and delays for the parties hereto.

(a) If the issue of pretext is decided favorably to Lynn, as we believe the record requires, that will terminate this litigation, except for important details respecting the relief necessary to make Lynn "whole." Such termination (i) will reduce congestion in Federal courts by eliminating a retrial, possible appeals, remands and further proceedings on the issue of whether the University's *1976* denial of tenure for Lynn violated Title VII; (ii) would avoid further delay in rendering judgment on the merits in this important Title VII case; and (iii) would result in very substantial savings in expense and time to the litigants.

(b) If, on the other hand, the decision on the issue of pretext was unfavorable to Lynn, such decision, nevertheless, would very substantially expedite the retrial of the case. It could appropriately narrow, and define, any unresolved matters as to pretext which the Court believed a retrial should resolve.

5. The record overwhelmingly shows that the issue of "pretext" should be decided in Lynn's favor.

(a) The Court of Appeals found (see p. 7-8, *supra*) that

Lynn

(i) proved a prima facie case

(ii) that statistical evidence showed "a pattern of academic sex discrimination by the University"

(iii) "the University's evaluation of Lynn's scholarship was due, in part to...a discriminatory attitude towards women."

(b) Dr. Nicole Marzac—a distinguished scholar in Lynn's field—testified that Lynn was eminently qualified for promotion to tenure and that a majority of the outside scholars who had reviewed Lynn's work were favorable to Lynn's scholarship (See p. 5-7, *supra*).

(c) The District Court, in Finding No. 10, found that a majority of the outside scholars *approved* Lynn's scholarship."Her work was favorably commented on by a majority of these scholars." (Appendix B p. 56, *infra*).

(d) The University's petition for Certiorari admits (p. 6, footnote 5), that the University offered *no evidence* as to the quality of Lynn's scholarship.

(e) Dr. Nicole Marzac testified, uncontradicted (p. 5-6, *supra*)

(i) that a University *ad hoc* committee which considered Lynn's works used sexist standards in judging Lynn's works and omitted, in its report, evidence of sex discrimination against Lynn.

(ii) that a letter in Lynn's file by the Dean of the School of Humanities was a "misrepresentation of the evidence" when it stated that "most of the outside scholars do not consider [Lynn's work] to be scholarly."

(f) The University's refusal to produce the evidence on which it based its decision against Lynn, and its threat of unlawful reprisal to coerce a witness into not testifying as to details of the University's action(see p. 6,7 *supra*) are "evidence of the most convincing character"

that the University's claim that it denied Lynn tenure because her scholarship was defective, is a pretext. (see *Interstate Circuit v. United States,* 306 U.S. 208, 226 (1938) (p. 11, *supra*).

The Cross Petition for Writ of Certiorari should be granted. The Court of Appeals, in failing to exercise its jurisdiction and decide the issue of "pretext," has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The important questions of Federal law (Title VII) relating to the scope and range of a University's claim of "confidentiality" of its records, partially decided by the Court of Appeals, have not been, but should be, settled by this Court in the interest of due administration of Title VII.

Respectfully submitted,

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Appendix A

[No. 79-3384. Sept. 21, 1981.]

THERESE BALLET LYNN and all others similarly situated, Plaintiffs-Appellants v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.

REINHARDT, C.J.: Therese Ballet Lynn was an assistant professor at the University of California at Irvine. She was denied merit salary increases and tenure. Lynn filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, alleging sex discrimination. Following trial, the district court entered judgement for the University. In her complaint Lynn also alleged discrimination on the basis of national origin; however, she has not pursued that claim.

Lynn was first employed by the University as a lecturer in 1961. She was promoted to assistant professor in 1971, and held that rank until leaving the University. She was denied a merit salary increase in 1971, after extramural evaluators judged her scholarship to be deficient. One evaluator was selected by the University, and one by Lynn. She was warned of deficient scholarship after internal reviews of extramural evaluations in both academic years 1972—1973 and 1973—1974. The latter evaluation was Lynn's mid-career review, pursuant to the University's policy that tenure be achieved within eight years or termination will result. She was given the opportunity to discuss her problems with members of her department, and during the 1974—1975 academic year was granted a sabbatical "for the explicit purpose of improving her scholarly research." Tenure review began in 1975 and culminated in the official denial of tenure by the University in June 1976. Lynn accepted the University's offer of a terminal one year appointment to June 1977.

The district court described the University's tenure review process as follows:

The University has a tenure review system for pro-

motion in which the excellence of a candidate's research, teaching, University and public service are judged. In order to receive candid evaluations from peers the reports of the various levels of review are confidential, as are the identities of an ad hoc review committee and the identities of extramural evaluators selected by the University. There are five levels of review in the tenure review process; each is independent of the other. The levels of review include that of the individual department of which the tenure candidate is a member, the dean of the school of which the department is a part, an ad hoc review committee, a review by the Budget Committee of the Academic Senate, review by the Office of Academic Affairs, and finally, review and decision by the Chancellor of the University of California, Irvine.

Lynn provided documentation and named extramural scholars for purposes of her tenure review; others were selected by her department chairman. The district court found after *in camera* review of the tenure review files that "[h]er work was favorably commented upon by a majority of these scholars." Nevertheless, denial of tenure was recommended at each level of the review process. After the denial, reconsideration was denied by the Budget Committee. A claim by Lynn, alleging discriminatory treatment, was then rejected by a special committee, after an investigation.

Lynn claims that she received disparate treatment from the University in its promotion and tenure decisions. The standards generally applicable to claims of disparate treatment under Title VII were laid down in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,800, 93 S.Ct. 1817, 1823, 36 L.Ed. 2d 668 (1973). *See also Furnco Const. Corp. v. Waters*, 438 U.S. 567, 572—73, 98 S.Ct. 2943, 2947, 57 L.Ed.2d 957 (1978). In *McDonnell Douglas* the Supreme Court set forth the four elements necessary to

establish a *prima facie* case of race discrimination under Title VII; the plaintiff must show:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. that, despite his qualifications, he was rejected; and
4. that after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

411 U.S. at 802, 93 S. Ct. at 1824 (footnote omitted). The Court cautioned that these four elements might not be necessarily applicable in every respect in all Title VII cases *Id.* at 802, n.13, 93 S.Ct. at 1824.

The courts of appeals have consistently approved the application of the *McDonnell Douglas* test to charges of discrimination in the academic context.[1] The FourthCircuit adopted the *McDonnell Douglas* elements and applied them to sex discrimination in the academic context. *Smith v. University of North Carolina,* 632 F.2d 316 (4th Cir. 1980). In *Smith,* the Fourth Circuit described the elements of a *prima facie* case of Title VII discrimination by an institution of higher learning; it said that the plaintiff must show:

1. that she is a member of a class protected by Title VII;
2. that she was qualified for the position or rank sought;
3. that she was denied promotion or reappointment;
4. that in cases of reappointment (or tenure) others (i.e., males) with similar qualifications achieved the rank or position.

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1. *See, e. g., Kunda v. Muhlenberg College,* 621 F.2d 532, 541—43 (3d Cir. 1980); *Whiting v. Jackson St. University,* 616 F2d 116, 120—21 (5th Cir. 1980); *Jepsen v. Florida Bd. of Regents,* 610 F2d 1379, 1382—83 (5th Cir. 1980); *Sweeney v. Board of Trustees of*

632 F.2d at 340. We agree that these are applicable elements in such cases.[2]

The test set forth above is not an exclusive one. Plaintiffs may under some circumstances establish a *prima facie* showing of unlawful discrimination in Title VII cases without satisfying the four specific elements of *McDonnell Douglas* or *Smith*. The Supreme Court has expressly rejected the argument that meeting the specific *McDonnell Douglas* requirements is the "only means" by which plaintiffs may make the requisite *prima facie* showing. *Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 1865 52 L.Ed.2d 396 (1977). The key, the Court said, is simply that the "plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* The Court subsequently explained that the plaintiff's inital burden is met where the plaintiff has shown that "it is more likely than not" that the employer's actions were based on unlawful considerations. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Thus, in Title VII cases involving institutions of higher learning, plaintiffs may establish their *prima facie* case by

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Keene St. College, 604 F.2d 106, 108 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980); *Davis v. Weidner*, 596 F.2d, 726, 729—31 (7th Cir. 1979); *Powell v. Syracuse Univ.*, 580 F.2d 1150,1154—56 (2d Cir.), *cert. denied*, 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

2. Although, *Smith*, like the case before us involves sex discrimination, and the four elements of plaintiff's *prima facie* case are here described in those terms, the same elements are applicable to claims of race discrimination in the academic context. Moreover, these elements are not applicable solely to claims relating to tenure, reappointment, or promotion, but with appropriate modifications, are also applicable to other Title VII claims involving faculty members, including initial hiring determinations.

a sufficient showing as to the four *Smith* elements or by offering other evidence which creates the inference that the complained of act was unlawful.

In *McDonnell Douglas,* the Court also established certain procedures governing the trial of Title VII cases. The "order and allocation of proof" are as follows: (1) the plaintiff must come forward with evidence sufficient to constitute a *prima facie* case of discrimination; (2) the defendant must then "articulate" a legitimate non-discriminatory reason for the adverse employment decision; and (3) the plaintiff must then be given the opportunity to show that the "assigned reason" was "a pretext or discriminatory in its application." *McDonnell Douglas,* 411 U.S. at 807, 93 S.Ct. at 1827.

The district court held, without discussing the four elements that establish a *prima facie* case under *McDonnell Douglas* and *Smith,* that Lynn failed to make the required showing. In the alternative, the district court held that the University "articulated legitimate and non-discriminatory reasons for not granting Lynn tenure." We assume, for purposes of our analysis, that the district court implicitly found that Lynn failed to show that the University's articulated reasons were " a pretext or discriminatory in [their] application."

The district court clearly erred in concluding that Lynn failed to establish a *prima facie* case of discrimination based on sex. "The burden of establishing a *prima facie* case is not onerous." *Texas Dept. of Community Affairs v. Burdine,* —, U.S. —, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). Lynn obviously satisfied elements (1) and (3) of the *McDonnell Douglas* test as applied by *Smith* in the academic context. She also adduced sufficient evidence as to elements (2) and (4) to satisfy her initial burden. In addition to testimony and documentary evidence, Lynn submitted two types of statistical data; the first, which we

refer to as "specific statistical data," tended to show that she met the objective criteria for tenure, and the second, which we refer to as "general statistical data," tended to show a general pattern of discrimination by the University in favor of men.

Lynn's specific statistical data, relating to the objective criteria for tenure, provided evidence that she had the same education, experience and number of published works as others who had been granted tenure. For purposes of deciding whether Lynn has established a *prima facie* case we find the specific statistical data submitted to be highly persuasive. It supports Lynn's contentions that she "was qualified for the position or rank sought," *i.e.*, element (2), and that "others (i.e., males) with similar qualifications achieved the rank or position," *i.e.*, element (4).

The general statistical data submitted by Lynn, as mentioned, provides evidence of a pattern of academic sex discrimination by the University. The district court described the University's past practices as follows:

> Over the years University administrators have shown a lack of concern for the need for minority and female faculty members, and such indifference persists. Even though the University of California at Irvine maintains an Affirmative Action Program, statistical summaries still display an underutilization of these groups.

Later in its memorandum, the district court noted "since its founding, Irvine has granted tenure to 26 men and only two women—the last woman tenured was in 1972."

The Supreme Court has stated that general statistical data is helpful in individual employment discrimination cases. *McDonnell Douglas,* 411 U.S. at 805, 93 S.Ct. at 1825. It is particularly helpful in the academic context, where the tenure decision is highly subjective. *Cf. Rowe v. General Motors,* 457 F.2d 348 (5th Cir. 1972).[3] It is

relevant despite the fact that the data may not be directly probative of any of the four specific elements set forth by *McDonnell Douglas* and *Smith*. Proof of a general pattern of sex discrimination is, in any event, evidence which tends to establish that it is "more likely than not" that a University's decision to deny tenure was based on sex, "a discriminatory criterion illegal under the Act." *See Furnco*

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3. Reliance on statistical proof at the *prima facie* case stage is not only practical, but also represents sound policy. The ultimate issue in a case like the one before us is whether the tenure decision was made on the basis of merit or on the basis of sex. Often, there is little direct evidence that plaintiffs can obtain when attempting to show that the decision was based on sex, *i.e.*, that there was discrimination in an individual hiring decision. Despite such problems of proof, Congress entrusted to the courts the responsibility of providing a forum for the litigation of claims of discrimination in universities and other institutions of higher learning. *Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978); The Equal Employment Opportunity Act of 1972, 86 Stat. 103, sec. 3 (1972). Although statistical data does not provide direct evidence of discrimination in the individual hiring decision, use of such data is an effective method of proof, and, accordingly, an effective method by which to discharge our responsibility under Title VII. Moreover, its use has another substantial benefit. Statistical evidence does not deal with the merits of the university's tenure decision, which necessarily involves academic judgments. Its use thus allows us "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior" proscribed by Title VII. *Powell*, 580 F.2d at 1154.

We do not suggest that avoiding review of internal university processes is an overriding policy. To the contrary, by amending Title VII to cover educational institutions, Congress "evidenced particular concern for the problem of employment bias in an academic setting." *Powell*, 580 F.2d at 1154, and thereby made the decision that the broad societal interest in eliminating discrimination should be of overriding concern in Title VII cases in the academic context. We note only that the use of statistical data minimizes the possibility that courts will substitute their judgments for those of university personnel while providing courts with an effective tool with which to enforce Title VII.

Construction Corp., 438 U.S. at 576, 98 S.Ct. at 2949 *(quoting Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866).

In addition, testimony at trial revealed that the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies is not a substantial topic for scholarly work.[4] The district court stated:

> The criticism leveled at her work by scholars and administration officials appears to reflect their disdain of this [women's studies] as a topic of substance in a scholarly work. I find their lack of enthusiasm for her effort may stem from their belief that woman's (sic) studies was an unworth topic to pursue.

The district court concluded, however, that the University's lack of enthusiasm towards women's studies was not evidence of discrimination because the University would have had the same objection if a man concentrated his studies on women's issues. We do not agree. A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women.[5] The existence of a discriminatory attitude, like general statistical data, tends to establish that it is more likely than not that the University's decision was based on an impermissible criterion, and therefore tends to establish Lynn's *prima facie* case.

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4. Lynn's study of French literature concentrated heavily on women's issues, *e.g.*, the influence of women on the development of French literature.

5. While we might not have made the statement in the text which accompanies this note a number of years ago, today its truth seems self-evident. The history of our nation reflects the evolution of our understanding of the nature of man (in the generic sense of the word) and the legitimate aspirations and rights of the individual. Attitudes which seemed benign at one time are now understood to be discriminatory. *Compare Brown V. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) with *Plessy v. Ferguson*,

After consideration of both types of statistical proof, and the other evidence submitted at trial, we believe it is clear that the district court's finding that Lynn failed to satisfy her initial burden of establishing a *prima facie* case was erroneous.

Next, we turn to whether the University "articulated" reasons for its denials of merit salary increases and of tenure. The University argues that its denials were based on deficiencies in Lynn's scholarship.

A *prima facie* case "raises an inference of discrimination." *Furnco Construction Corp.*, 438 U.S. at 577, 98 S.Ct. at 2949. "To dispel the adverse inference from a *prima facie* showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Id.* at

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163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The beliefs that women should not have the right to vote, practice law, or serve on the United States Supreme Court, were once reflective of majority view, and the law. We now understand, somewhat belatedly, that these concepts reflect a discriminatory attitude. Today any person is free to hold to such concepts, but such concepts may not serve as the basis for job-related decisions in employment covered by Title VII. Other concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting. We are sensitive to the problems related to judicial examination of issues like the importance of women's studies, and to the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula. Accordingly, the view we express is a narrow one. We are saying only what Title VII commands: when plaintiffs establish that decisions regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.

578, 98 S.Ct. at 2950, *quoting McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. The Court, in *Board of Trustees of Keene St. Col. v. Sweeney,* 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), made it clear that the burden of "articulating some legitimate, nondiscriminatory reason" is significantly less than proving the absence of discriminatory motive.[6] Accordingly, the court held in *Burdine* that the defendant-employer need not prove by a preponderance of the evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason, and the court there stated that "[i]t is sufficient if the defendant's *evidence* raises a genuine issue of fact as to whether it discriminated against the plaintiff." 101 S.Ct. at 1094 (emphasis added) (footnote omitted).[7]

The evidence offered by the University shows that throughout Lynn's career she was warned that her scholarship was suspect. As mentioned earlier, she was given the opportunity to discuss her problems with members of her department, and after her mid-career review, she was granted sabbatical leave for the explicit purpose of improving her research and writing skills. It was Lynn's deficient scholarship that the tenure review committee claims was the basis of its decision not to recommend merit increases or tenure. Without doubt deficient

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6. The Court reasoned that if employers were required to prove the absence of discriminatory motive, the third stage of the *McDonnell Douglas* analysis would be superfluous, "since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step." *Board of Trustees of Keene St. Col. v. Sweeney,* 439 U.S. at 24 n.1, 99 S.Ct. at 295 n.1.

7. Although prior decisions had spoken only of "articulating" a reason, *Burdine* makes it clear that the defendant must produce some evidence to rebut the plaintiff's case. 101 S.Ct. at 1094.

scholarship is a legitimate, non-discriminatory reason to deny salary increases or tenure. In view of the standard set forth in *McDonnell Douglas, Sweeney* and *Burdine,* and the relative ease with which the courts of appeals have found the employer's burden to be satisfied in the academic context, *see, e.g., Smith v. University of North Carolina.* 632 F.2d 316, we agree that the University successfully "articulated" reasons that justify its actions, *i.e.,* it offered evidence supporting its reasons for denying Lynn tenure.

Under some views of the *McDonnell Douglas* analytical process, the University's articulated reason and supporting evidence might be considered at step one of that process, *i.e.,* in connection with plaintiff's *prima facie* showing that she possesses the requisite qualifications for tenure. *See Leiberman v. Gant,* 630 F.2d 60,64 (2d Cir. 1980). We think it preferable, however, to consider the University's arguments at steps two and three. In our view, objective job qualifications are best treated at step one and subjective criteria, along with any supporting evidence, are best treated at the later stages of the process. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the *McDonnell Douglas* process. *See Sweeney,* 439 U.S. at 24, n.1, 99 S. Ct. at 295 n.1. In addition, addressing the University's arguments at the first step of the analysis would increase the possibility that courts will be required to engage in evaluations of the performance of faculty members, a task to which others are better suited.[8]

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8. The qualifications that are most appropriately considered at step one are those to which objective criteria can be applied, such as level of education, years of teaching experience, in general and at the particular institution, and the publication of scholarly materials. Where the basic objective criteria are not met, plaintiff has failed to

From a practical standpoint, and despite our determination that evidence of the nature here involved should be considered in connection with steps two and three rather than step one, it should make little difference to the outcome which way the evidence is analyzed. If evidence relating to subjective criteria is treated as relevant to step one, the plaintiff would be entitled, in connection with that aspect of the case, to show that the alleged criteria are inherently discriminatory or discriminatorily applied, or to show that notwithstanding the University's contentions, she meets the criteria. If offered by the University to meet its step two burden, the plaintiff must attempt to show that the reason offered is not the real explanation for the University's decision, but is merely an excuse for a discriminatory act. While it is true that the University need offer little evidence in support of its articulated reason in order to require plaintiff to proceed to step three, the more substantial the University's evidence the more persuasive plaintiff's step three evidence must be in order to establish that the articulated reason is pretextual or was discriminatorily applied. Regardless of the stage at which we consider evidence of the nature here involved, the plaintiff's ultimate burden remains the same, to show by a preponderance of the evidence that the University's action was based on unlawful discriminatory conduct.[9]

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establish a *prima facie* case. However, in some instances a showing of specific or general discriminatory conduct by a university through statistical or other evidence will be sufficient to raise doubts as to whether objective criteria are applied in a non-discriminatory manner. In those instances dismissal would not be proper, even though plaintiff has failed to show he has met the "objective criteria."

9. We should note that when evidence that supports the University's articulated reason is introduced during the plaintiff's presentation of his case, the plaintiff is required to counter such evidence and offer his proof as to pretext before resting. *See Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981).

Since, as we concluded *ante*, the district court properly found that the University "articulated [a] legitimate, non-discriminatory reason," we would ordinarily next determine if the reason "articulated" by the University was "a pretext or discriminatory in its application." However, we do not decide that issue here.

Throughout the proceedings below, Lynn was denied access to her tenure review file. The materials contained in the file were those upon which the tenure review committee claims that it based its denial of tenure, and, as such, are highly relevant to the issues in this case. At the discovery stage, when Lynn requested that the University produce the file, the district court issued a protective order. At trial, the University submitted the file to the court; the court reviewed it *in camera* but refused to disclose the contents of the file to Lynn. Lynn asserts that the file was submitted by the University, and used by the district court, as evidence, rather than for the purpose of determining whether the contents of the file were privileged.[10] Thus, Lynn contends that the refusal to disclose the contents of the file violated due process. We agree.[11]

During direct examination of Lynn, her attorney offered the minority report of the tenure review committee as evidence. In response, the following statements were made.

Ms. Helwick (attorney for the University): The prob-

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10. Lynn's principal contention before this court, that she was entitled to access to the file and that the denial of access prevented her from having an adequate opportunity to prove discrimination within the meaning of Title VII, is discussed, *post*. *See* text accompanying note 12, *et seq*.

11. The University does not contend that it would be proper for the district court to have accepted and used the file as evidence without disclosure to Lynn. Rather, the University argues that the file was neither submitted, accepted nor used as evidence.

lem, your Honor, is that obviously, if this is admitted into evidence then we have a problem by way of a response, and then we get into the whole scholarly debate of the quality of Dr. Lynn's scholarship...

The Court: I think I have to permit it to come in, even though it may place you in the position of having to counter-balance it. It is sort of like the position the government is put in when it wants to prosecute a person for some type of intrusion into government records and in order to do it must bring forth these records.

Ms. Helwick:...and I think that by submitting this document we will necessarily have to further violate the confidentiality of those same extramural scholars.

The Court: It is possible for you to meet this by showing content of the majority report but not authorship?

Ms. Helwick: I think not,...

The Court: Why can't it be submitted, then for *in camera* inspection of the Court and not of the plaintiff.

Ms. Helwick: I have no objection to an *in camera* review by your Honor of the entire tenure review file, if you deem that appropriate.

The minority report was then admitted into evidence.

Later in the trial, the University presented the district court with the tenure review file for *in camera* inspection:

Mr. Lundberg (attorney for the University):...And you have a portion of that which has been admitted as Exhibit 23 [the minority report]. But there is material you do not have, and we feel for purposes of your making a complete review that you ought to be provided with the file that was before the ad hoc review committee. This is what we propose to provide you.

The Court: All right.[12]

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12. Counsel for plaintiff repeatedly requested the right to see the file. When counsel for the University offered the file (three

The record leaves little doubt that the University submitted the tenure review file to counter-balance the effect of the minority report and that the district court acceded to this use of the file.

Moreover, in its findings of fact, the district court wrote, "[h]er work was favorably commented upon by a majority of the scholars." And, in its Memorandum filed in May, 1977, the district court stated that "scholars who reviewed her work criticized the quality of her scholarship because they detected a 'trendy' flavor in the themes she tried to develop; they describe it as 'popularization.' " Careful review of the record has not revealed the source of these assertions. We are thus led to conclude that the source was the tenure review file. The district court, therefore, not only acceded to the University's submission of the file as evidence, but used the contents of the file in reaching its decision.

The receipt and review by the district court of the tenure review file for the purpose of assisting it to make factual determinations or to evaluate other evidence violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court. Thus, the district court's receipt and review of the file, without disclosure of its contents to Lynn, requires reversal of the order of the district court.

In view of our holding, we need not decide the question whether tenure review files, and more particularly peer

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folders) to the court, saying "I would now submit them to the court, your Honor," plaintiff's counsel objected. In fact, she objected to even an inspection of the file by the court for the reason that plaintiff had not been allowed to see it.

evaluations are privileged in academic Title VII cases generally. We do wish, however, to provide the district court with some guidance on the question since that court will be required, once again, to consider the issue of Lynn's right to obtain her tenure review file, upon remand.[13]

When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interest in confidentiality, *i.e.*, in maintaining the effectiveness of its tenure review process, and the need which Title VII plaintiffs have for obtaining peer evaluations in their efforts to prove discriminatory conduct. *Jepsen v. Florida Bd. of Regents,* 610 F.2d 1379, 1384—85 (5th Cir. 1980); *Keyes v. Lenoir Rhyne College,* 552 F.2d 579, 581 (4th Cir.), *cert. denied* 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed. 2d 190 (1977). In making that determination it is necessary to consider the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in educational employment.

The Fourth Circuit has suggested, *Keyes v. Lenoir Rhyne College,* 552 F.2d 579 and the Fifth Circuit has held, *Jepsen v. Florida Bd. of Regents,* 610 F.2d 1379, that when

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13. While the remainder of our discussion is confined to future use of the tenure review file, we also note for the district court's benefit upon remand, that some of the evidence previously discussed in connection with plaintiff's *prima facie* case is also relevant with respect to her efforts to establish that the University's articulated reason was "a pretext or discriminatory in its application." Evidence is not necessarily submitted solely to establish a *prima facie* case or to show pretext or discriminatory application; it may be used, when relevant, to establish either of plaintiff's steps in the *McDonnell Douglas* process or both. For example, general statistical data is relevant to a showing of discriminatory application, and thus may be used at the third step in the *McDonnell Douglas* process, *McDonnell Douglas,* 411 U.S. at 805, 93 S.Ct. at 1825, as well as at the *prima facie* step.

evaluations serve as the alleged basis for the University's decision to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file and that in such cases the evaluations must be provided to the plaintiff. In *Keyes*, the Fourth Circuit denied plaintiff's request for all peer evaluations for the entire faculty of the College. The court noted, however, that "if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them" to prove her case. 552 F.2d at 581.[14] The Fifth Circuit, in *Jepsen*, found the reasoning in *Keyes* to be "persuasive," and held that where "the university defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex," a plaintiff is entitled to obtain the evaluations. 610 F.2d at 1384.[15]

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14. Keyes was a class action suit brought by a class plaintiff on behalf of the female faculty of Lenoir Rhyne College. The class plaintiff alleged sex discrimination in salaries and promotions. To show that the College's explanations for variances in salaries and promotions were pretextual, she requested, *inter alia*, peer evaluations for all members of the College faculty. It was in this context that the Fourth Circuit held that the evaluations need not be disclosed.

Keyes, the class plaintiff, also had an individual complaint against the College. She alleged that the College's decision to deny her request for an extension of tenure was made on the basis of sex. The College claimed that its denial was based solely on the fact that she was too old. The Fourth Circuit did not address the question of whether Keyes was entitled to her own evaluations. Nor did the Fourth Circuit reveal whether she in fact received these evaluations.

15. We believe the word "solely" was used for the purpose of reflecting accurately the use that the University actually made of the files in the case before the court. We do not believe the Fifth Circuit intended to limit its ruling to cases in which the university considered only faculty evaluations and to exclude from the operation of its rule cases in which the university considered other materials as well as

The University claims that Lynn was denied tenure because of deficient scholarship. Since its view of Lynn's ability is based, in large part, on the content of the tenure review file, including peer evaluations, the University is defending, in essence, on the ground that its tenure decision with respect to Lynn was based on non-discriminatory peer evalutions. Under *Jepsen* and *Keyes*, disclosure of the evaluations would be required. We agree fully with the views expressed by the Fourth and Fifth Circuits in that respect. However, in Lynn's case it is not necessary to rely on the right of academic plaintiffs generally to obtain evaluations when a university has used the documents in reaching its decision. The record before us reveals that the University has far less interest in the confidentiality of Lynn's tenure review file than in the ordinary case in which disputes over such files arise.

Lynn received summaries of the comments of her evaluators, as do all University academic personnel when they so request.[16] Unlike the ordinary plaintiff, however,

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faculty evaluations. We understand the rule which the court set forth to mean that the plaintiff must be permitted to obtain evaluations whenever the university's decision is based on them, in whole or in part.

16. University of California Rule 195—20, entitled "Access to Academic Personnel Records," protects individuals' rights to privacy and sets forth when, and to whom, academic records may be disclosed. The rule provides that an individual may inspect all documents except "confidential documents." Those deemed confidential are: (a) letters of evaluation submitted in confidence, (b) letters from the chairperson setting forth a departmental recommendation regarding appointment, promotion, merit increases, appraisal, reappointment, nonreappointment, or terminal appointment, or (c) reports, recommendations from ad hoc and standing committees. Rule 195—20b. (1) The rule also provides that an individual has the right to oral or written summaries of "confidential documents." Rule 195—20b (2).

Lynn knew the names of her evaluators due to the fact that Dr. Nicole Marzac, in violation of the University rule, provided her with a copy of the minority report.[17] Moreover, Marzac provided Lynn with copies of letters written by Marzac to Chancellor Aldrich and to Professor Stephen, as well as the minutes of the meeting of the tenure review committee.[18] The final pieces of information undermining the confidentiality of the file were provided, at trial, by Professor Slim, chairman of the tenure review committee. Professor Slim was cross-examined on the proceedings that were conducted by the tenure review committee, and on the majority report. His testimony provided Lynn with further knowledge as to the personal views of the committee members.

Although it cannot be determined with certainty which members of the committee, or evaluators, made which comments, the documentary evidence in Lynn's possession, in addition to Marzac's description of that evidence in her deposition filed with the district court and Slim's testimony at the trial make it possible to attribute specific views and attitudes to specific evaluators. Accordingly, the confidentiality of Lynn's file has been substantially diminished as a result of the information already in her possession.

The district court's determination as to whether and when Lynn may have access to her tenure review file for purposes related to a new trial should be reached in light of the strong interest which Lynn continues to have in de-

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17. Dr. Marzac authored the minority report. The minority report represents the views of those who disagreed with the committee's recommendation that tenure be denied.

18. The letters and the minutes were subject to the confidentiality rule of the University and were not to be disclosed.

termining whether the contents of the file will assist her in proving her case (and particularly in establishing that the University's articulated reason for denial of tenure was "a pretext or discriminatory in its application"), and the minimal interest that the University now has in preserving the vestiges of confidentiality in the file.[19]

The order of the district court is reversed and remanded for proceedings consistent with this opinion.

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19. Without suggesting that an *in camera* review would ever be appropriate in determining a plaintiff's entitlement to a tenure review file we note that, upon remand, the district court should determine any questions relating to Lynn's right to obtain her tenure review file without considering the nature of its contents or making any *in camera* review thereof.

Appendix B

[No. 79-3384. Sept. 21, 1981, as amended Dec. 18, 1981.]

THERESE BALLET LYNN and all others similarly situated, Plaintiffs-Appellants v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.

AMENDED OPINION

REINHARDT, Circuit Judge.

Therese Ballet Lynn was an assistant professor at the University of California at Irvine. She was denied merit salary increases and tenure. Lynn filed suite under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, alleging sex discrimination. Following trial, the district court entered judgment for the University. In her complaint Lynn also alleged discrimination on the basis of national origin; however, she has not pursued that claim.

Lynn was first employed by the University as a lecturer in 1969. She was promoted to assistant professor in 1971, and held that rank until leaving the University. She was denied a merit salary increase in 1971, after extramural evaluators judged her scholarship to be deficient. One evaluator was selected by the University, and one by Lynn. She was warned of deficient scholarship after internal reviews of extramural evaluations in both academic years 1972-1973 and 1973-1974. The latter evaluation was Lynn's mid-career review, pursuant to the University's policy that tenure be achieved within eight years or termination will result. She was given the opportunity to discuss her problems with members of her department, and during the 1974-1975 academic year was granted a sabbatical "for the explicit purpose of improving her scholarly research." Tenure review began in 1975 and culminated in the official denial of tenure by the University in June 1976. Lynn accepted the Unviersity's offer of

a terminal one year appointment to June 1977.

The district court described the University's tenure review process as follows:

> The University has a tenure review system for promotion in which the excellence of a candidate's research, teaching, University and public service are judged. In order to receive candid evaluations from peers the reports of the various levels of review are confidential, as are the identities of an ad hoc review committee and the identities of extramural evaluators selected by the University. There are five levels of review in the tenure Review process; each is independent of the other. The levels of review include that of the individual department of which the tenure candidate is a member, the dean of the school of which the department is a part, an ad hoc review committee, a review by the Budget Committee of the Academic Senate, review by the Office of Academic Affairs, and finally, review and decision by the Chancellor of the University of California, Irvine.

Lynn provided documentation and named extramural scholars for purposes of her tenure review; others were selected by her department chairman. The district court found, after *in camera* review of the tenure review files that "[h]er work was favorably commented upon by a majority of these scholars." Nevertheless, denial of tenure was recommended at each level of the review process. After the denial, reconsideration was denied by the Budget Committee. A claim by Lynn, alleging discriminatory treatment, was then rejected by a special committee, after an investigation.

Lynn claims that she received disparate treatment from the University in its promotion and tenure decisions. The standards generally applicable to claims of disparate treatment under Title VII were laid down in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800,

93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973). *See also Furnco Const. Corp. v. Waters*, 438 U.S. 567, 572—73, 98 S.Ct. 2943, 2947, 57 L.Ed.2d 957 (1978). In *Mc Donnell Douglas* the Supreme Court set forth the four elements necessary to establish a *prima facie* case of race discrimination under Title VII; the plaintiff must show:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. that, despite his qualifications, he was rejected, and
4. that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824 (footnote omitted). The Court cautioned that these four elements might not be necessarily applicable in every respect in all Title VII cases. *Id.* at 802 n.13, 93 S.Ct. at 1824.

The courts of appeals have consistently approved the application of the *McDonnell Douglas* test to charges of discrimination in the academic context.[1] The Fourth Circuit adopted the *McDonnell Douglas* elements and applied them to sex discrimination in the academic context. *Smith v. University of North Carolina*, 632 F.2d 316 (4th

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1. *See, e.g., Kunda v. Muhlenberg College*, 621 F.2d 532, 541—43 (3d Cir. 1980); *Whiting v. Jackson St. University*, 616 F.2d 116, 120—21 (5th Cir. 1980); *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1382—83 (5th Cir. 1980); *Sweeney v. Board of Trustees of Keene St. College*, 604 F.2d 106, 108 (1st Cir. 1979), *cert. denied* 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980); *Davis v. Weidner*, 596 F.2d 726, 729—31 (7th Cir. 1979); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154—56 (2d Cir), *cert. denied* 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

Cir. 1980). In *Smith*, the Fourth Circuit described the elements of a *prima facie* case of Title VII discrimination by an institution of higher learning; it said that the plaintiff must show:

1. that she is a member of a class protected by Title VII;
2. that she was qualified for the position or rank sought;
3. that she was denied promotion or reappointment;
4. that in cases of reappointment (or tenure) others (*i.e.*, males) with similar qualifications achieved the rank or position.

632.F2d at 340. We agree that these are the applicable elements in such cases.[2]

The test set forth above is not an exclusive one. Plaintiffs may under some circumstances establish a *prima facie* showing of unlawful discrimination in Title VII cases without satisfying the four specific elements of *McDonnell Douglas* or *Smith*. The Supreme Court has expressly rejected the argument that meeting the specific *McDonnell Douglas* requirements is the "only means" by which plaintiffs may make the requisite *prima facie* showing. *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 52 L.Ed.2d 396 (1977). The key, the Court said, is simply that the "plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on

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2. Although *Smith* like the case before us involves sex discrimination, and the four elements of plaintiff's *prima facie* case are here described in those terms, the same elements are applicable to claims of race discrimination in the academic context. Moreover, these elements are not applicable solely to claims relating to tenure, reappointment, or promotion, but with appropriate modifications, are also applicable to other Title VII claims involving faculty members, including initial hiring determinations.

a discriminatory criterion illegal under the Act." *Id.* The Court subsequently explained that the plaintiff's initial burden is met where the plaintiff has shown that "it is more likely than not" that the employer's actions were based on unlawful considerations. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Thus, in Title VII cases involving institutions of higher learning, plaintiffs may establish their *prima facie* case by a sufficient showing as to the four *Smith* elements or by offering other evidence which creates the inference that the complained of act was unlawful.

In *McDonnell Douglas*, the Court also established certain procedures governing the trial of Title VII cases. The "order and allocation of proof" are as follows: (1) the plaintiff must come forward with evidence sufficient to constitute a *prima facie* case of discrimination (2) the defendant must then "articulate" a legitimate non-discriminatory reason for the adverse employment decision; and (3) the plaintiff must then be given the opportunity to show that the "assigned reason" was "a pretext or discriminatory in its application." *McDonnell Douglas*, 411 U.S. at 807, 93 S.Ct. at 1827.

The district court held, without discussing the four elements that establish a *prima facie* case under *McDonnell Douglas* and *Smith*, that Lynn failed to make the required showing. In the alternative, the district court held that the University "articulated legitimate and non-discriminatory reasons for not granting Lynn tenure." We assume, for purposes of our analysis, that the district court implicitly found that Lynn failed to show that the University's articulated reasons were "a pretext or discriminatory in [their] application."

The district court clearly erred in concluding

that Lynn failed to establish a *prima facie* case of discrimination based on sex. "The burden of establishing a *prima facie* case is not onerous." *Texas Dept. of Community Affairs v. Burdine*, — U.S. —, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). Lynn obviously satisfied elements (1) and (3) of the *McDonnell Douglas* test as applied by Smith in the academic context. She also adduced sufficient evidence as to elements (2) and (4) to satisfy her initial burden. In addition to testimony and documentary evidence, Lynn submitted two types of statistical data; the first, which we refer to as "specific statistical data," tended to show that she met the objective criteria for tenure, and the second, which we refer to as "general statistical data," tended to show a general pattern of discrimination by the University in favor of men.

Lynn's specific statistical data, relating to the objective criteria for tenure, provided evidence that she had the same education, experience and number of published works as others who had been granted tenure. For purposes of deciding whether Lynn has established a *prima facie* case we find the specific statistical data submitted to be highly persuasive. It supports Lynn's contentions that she "was qualified for the position or rank sought," *i.e.*, element (2), and that "others (*i.e.*, males) with similar qualifications achieved the rank or position," *i.e.*, element (4).

The general statistical data submitted by Lynn, as mentioned, provides evidence of a pattern of academic sex discrimination by the University. The district court described the University's past practices as follows:

> Over the years University administrators have shown a lack of concern for the need for minority and female faculty members, and such indifference per-

> sists. Even though the University of California at Irvine maintains an Affirmative Action Program, statistical summaries still display an under utilization of these groups.

Later in its memorandum, the district court noted "since its founding, Irvine has granted tenure to 26 men and only two women—the last woman tenured was in 1972."

The Supreme Court has stated that general statistical data is helpful in individual employment discrimination cases. *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. at 1825. It is particularly helpful in the academic context, where the tenure decision is highly subjective. *Cf. Rowe v. General Motors*, 457 F.2d 348 (5th Cir. 1972).[3] It is relevant despite the fact that the data may not be directly

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3. Reliance on statistical proof at the *prima facie* case stage is not only practical, but also represents sound policy. The ultimate issue in a case like the one before us is whether the tenure decision was made on the basis of merit or on the basis of sex. Often, there is little direct evidence that plaintiffs can obtain when attempting to show that the decision was based on sex, *i.e.*, that there was discrimination in an individual hiring decision. Despite such problems of proof, Congress entrusted to the courts the responsibility of providing a forum for the litigation of claims of discrimination in universities and other institutions of higher learning. *Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978); The Equal Employment Opportunity Act of 1972, 86 Stat. 103, sec. 3 (1972). Although statistical data does not provide direct evidence of discrimination in the individual hiring decision, use of such data is an effective method of proof, and, accordingly, an effective method by which to discharge our responsibility under Title VII. Moreover, its use has another substantial benefit. Statistical evidence does not deal with the merits of the university's tenure decision, which necessarily involves academic judgments. Its use thus allows us "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior" proscribed by Title VII. *Powell*, 580 F.2d at 1154.

probative of any of the four specific elements set forth by *McDonnell Douglas* and *Smith*. Proof of a general pattern of sex discrimination is, in any event, evidence which tends to establish that it is "more likely than not" that a University's decision to deny tenure was based on sex, "a discriminatory criterion illegal under the Act." *See Furnco Construction Corp.*, 438 U.S. at 576, 98 S.Ct. at 2949 *(quoting Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866).

[5] In addition, testimony at trial revealed that the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies is not a substantial topic for scholarly work.[4] The district court stated:

> The critism leveled at her work by scholars and administration officials appears to reflect their disdain of this [women's studies] as a topic of substance in a scholarly work. I find their lack of enthusiasm for her effort may stem from their belief that woman's [sic] studies was an unworthy topic to pursue.

The district court concluded, however, that the University's lack of enthusiasm towards women's studies was not evidence of discrimination because the University

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Whe do not suggest that avoiding a review of internal university processes is an overriding policy. To the contrary, by amending Title VII to cover educational institutions, Congress "evidenced particular concern for the problem of employment bias in an academic setting," *Powell*, 580 F.2d at 1154, and thereby made the decision that the broad societal interest in eliminating discrimination should be of overriding concern in Title VII cases in the academic context. We note only that the use of statistical data minimizes the possibility that courts will substitute their judgments for those of university personnel while providing courts with an effective tool with which to enforce Title VII.

4. Lynn's study of French literature concentrated heavily on women's issues, *e.g.*, the influence of women on the development of French literature.

would have had the same objection if a man concentrated his studies on women's issues. We do not agree. A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women.[5] The existence of a discriminatory attitude, like general statistical data, tends to establish that it is more likely than not that the University's decision was based on an impermissible criterion, and therefore tends to establish Lynn's *prima facie* case.

After consideration of both types of statiscal proof, and the other evidence submitted at trial, we believe it is clear that the district court's finding that Lynn failed to satisfy her initial burden of establishing a *prima facie* case was erroneous.

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5. While we might not have made the statement in the text which accompanies this note a number of years ago, today its truth seems self-evident. The history of our nation reflects the evolution of our understanding of the nature of man (in the generic sense of the word) and the legitimate aspirations and rights of the individual. Attitudes which seemed benign at one time are now understood to be discriminatory. *Compare Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) *with Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The beliefs that women should not have the right to vote, practice law, or serve on the United States Supreme Court, were once reflective of the majority view, and the law. We now understand, somewhat belatedly, that these concepts reflect a discriminatory attitude. Today any person is free to hold to such concepts, but such concepts may not serve as the basis for job-related decisions in employment covered by Title VII. Other concepts reflect a discriminatory attitude more subtly; the subtlety does not , however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting. We are sensitive to the problems related to judicial examination of issues like the importance of women's studies, and to the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula. Accordingly, the view we

Next, we turn to whether the University "articulated" reasons for its denials of merit salary increases and of tenure. The University argues that its denials were based on deficiencies in Lynn's scholarship.

A *prima facie* case "raises and inference of discrimination." *Furnco Construction Corp.*, 438 U.S. at 577, 98 S.Ct. at 2949. "To dispel the adverse inference from a *prima facie* showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, non-discriminatory reason for the employee's rejection.' " *Id.* at 578, 98 S. Ct. at 2950, *quoting McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. The Court, in *Board of Trustees of Keene St. Col. v. Sweeney*, 439 U.S. 24, 25, 99 S. Ct. 295, 58 L.Ed.2d 216 (1978), made it clear that the burden of "articulating some legitimate, non-discriminatory reason" is significantly less than proving the absence of discriminatory motive.[6] Accordingly, the court held in *Burdine* that the defendant-employer need not prove by a preponderance of the evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason, and the court there stated that "[i]t is sufficient if the defendant's *evidence* raises a genuine issue of fact as to whether it discriminated against the plaintiff." 101 S.

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express is a narrow one. We are saying only that Title VII commands: when plaintiffs establish that decisions regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.

6. The Court reasoned that if employers were required to prove the absence of discriminatory motive, the third stage of the *McDonnell Douglas* analysis would be superfluous, "since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step." *Board of Trustees of Keene St. Col. v Sweeney*, 439 U.S. at 24 n.1, 99 S.Ct. at 295 n.1.

Ct. at 1094 (emphasis added) (footnote omitted).[7]

The evidence offered by the University shows that throughout Lynn's career she was warned that her scholarship was suspect. As mentioned earlier, she was given the opportunity to discuss her problems with members of her department, and after her mid-career review, she was granted sabbatical leave for the explicit purpose of improving her research and writing skills. It was Lynn's deficient scholarship that the tenure review committee claims was the basis of its decision not to recommend merit increases or tenure. Without doubt, deficient scholarship is a legitimate, nondiscriminatory reason to deny salary increases or tenure. In view of the standard set forth in *McDonnell Douglas*, *Sweeney* and *Burdine*, and the relative ease with which the courts of appeals have found the employer's burden to be satisfied in the academic context, *see, e.g.*, *Smith v. University of North Carolina*, 632 F.2d 316, we agree that the University successfully "articulated" reasons that justify its actions, *i.e.*, it offered evidence supporting its reasons for denying Lynn tenure.

Under some views of the *McDonnell Douglas* analytical process, the University's articulated reason and supporting evidence might be considered at step one of that process, *i.e.*, in connection with Plaintiff's *prima facie* showing that she possesses the requisite qualifications for tenure. *See Leiberman v. Gant*, 630 F.2d 60, 64 (2nd Cir. 1980). We think it preferable, however, to consider the University's arguments at steps two and three. In our view, objective job qualifications are best treated at step one and subjective criteria, along

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7. Although prior decisions had spoken only of "articulating" a reason, *Burdine* makes it clear that the defendant must produce some evidence to rebut the plaintiff's case. 101 S.Ct. at 1094.

with any supporting evidence, are best treated at the later stages of the process. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the *McDonnell Douglas* process. *See Sweeney*, 439 U.S. at 24 n.1, 99 S.Ct. at 295 n.1. In addition, addressing the University's arguments at the first step of the analysis would increase the possibility that courts will be required to engage in evaluations of the performance of faculty members, a task to which others are better suited.[8]

From a practical standpoint, and despite our determination that evidence of the nature here involved should be considered in connection with steps two and three rather than step one, it should make little difference to the outcome which way the evidence is analyzed. If evidence relating to subjective criteria is treated as relevant to step one, the plaintiff would be entitled, in connection with that aspect of the case, to show that the alleged criteria are inherently discriminatory or discriminatorily applied, or to show that notwithstanding the University's contention, she meets the criteria. If

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8. The qualifications that are most appropriately considered at step one are those to which objective criteria can be applied, such as level of education, years of teaching experience, in general and at the particular institution, and the publication of scholarly materials. Where the basic objective criteria are not met, plaintiff has failed to establish a *prima facie* case. However, in some instances a showing of specific or general discriminatory conduct by a university through statistical or other evidence will be sufficient to raise doubts as to whether objective criteria are applied in a non-discriminatory manner. In those instances dismissal would not be proper, even though plaintiff has failed to show he has met the "objective criteria."

offered by the University to meet its step two burden, the plaintiff must attempt to show that the reason offered is not the real explanation for the University's decision, but is merely an excuse for a discriminatory act. While it is true that the University need offer little evidence in support of its articulated reason in order to require plaintiff to proceed to step three, the more substantial the University's evidence the more persuasive plaintiff's step three evidence must be in order to establish that the articulated reason is pretextual or was discriminatorily applied. Regardless of the stage at which we consider evidence of the nature here involved, the plaintiff's ultimate burden remains the same, to show by a preponderance of the evidence that the University's action was based on unlawful discriminatory conduct.'

Since, as we concluded *ante*, the district court properly found that the University "articulated [a] legitimate, non-discriminatory reason," we would ordinarily next determine if the reason "articulated" by the University was "a pretext or discriminatory in its application." However, we do not decide that issue here.

Throughout the proceedings below, Lynn was denied access to her tenure review file. The materials contained in the file were those upon which the tenure review committee claims that it based its denial of tenure, and as such, are highly relevant to the issues in this case. At the discovery stage, when Lynn requested that the University produce the file, the district court

9. We should note that when evidence that supports the University's articulated reason is introduced during the plaintiff's presentation of his case, the plaintiff is required to counter such evidence and offer his proof as to pretext before resting. *See Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981).

issued a protective order. At trial, the University submitted the file to the court; the court reviewed it *in camera* but refused to disclose the contents of the file to Lynn. Lynn asserts that the file was submitted by the University, and used by the district court, as evidence, rather than for the purpose of determining whether the contents of the file were privileged.[10] Thus, Lynn contends that the refusal to disclose the contents of the file violated due process. We agree.[11]

During direct examination of Lynn, her attorney offered the minority report of the tenure review committee as evidence. In response, the following statements were made:

> MS. HELWICK (attorney for the University): The problem, your Honor, is that obviously, if this is admitted into evidence then we have a problem by way of a response, and then we get into the whole scholarly debate of the quality of Dr. Lynn's scholarship...
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> THE COURT: I think I have to permit it to come in, even though it may place you in the position of having to counter-balance it. It is sort of like the position the government is put in when it wants to prosecute a person for some type of intrusion into government records, and in order to do it must bring

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10. Lynn's principal contention before this court, that she was entitled to access to the file and that the denial of access prevented her from having an adequate opportunity to prove discrimination within the meaning of Title VII, is discussed, *post*. *See* text accompanying note 12, *et seq*.

11. The University does not contend that it would be proper for the district court to have accepted and used the file as evidence without disclosure to Lynn. Rather, the University argues that the file was neither submitted, accepted nor used as evidence.

forth those records...

MS. HELWICK:...and I think that by submitting this document we will necessarily have to further violate the confidentiality of those same extramural scholars.

THE COURT: Is it possible for you to meet this by showing content of the majority report but not authorship?

MS. HELWICK: I think not,...

THE COURT: Why can't it be submitted, then for *in camera* inspection of the Court and not of the plaintiff.

MS. HELWICK: I have not objection to an *in camera* review by your Honor of the entire tenure review file, if you deem that appropriate.

The minority report was then admitted into evidence.

Later in the trial, the University presented the district court with the tenure review file for *in camera* inspection:

MR. LUNDBERG (attorney for the University):... And you have a portion of that which has been admitted as Exhibit 23 [the minority report]. But there is material you do not have, and we feel for purposes of your making a complete review that you ought to be provided with the file that was before the ad hoc review committee. This is what we propose to provide you.

THE COURT: All right.[12]

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12. Counsel for plaintiff repeatedly requested the right to see the file. When counsel for the University offered the file (three folders) to the court, saying "I would now submit them to the court, your Honor," plaintiff's counsel objected. In fact, she objected to even an inspection of the file by the court for the reason that plaintiff had not been allowed to see it.

The record leaves little doubt that the University submitted the tenure review file to counter-balance the effect of the minority report and that the district court acceded to this use of the file.

The receipt and review by the district court of the tenure review file for the purpose of assisting it to make factual determinations or to evaluate other evidence violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court. Thus, the district court's receipt and review of the file, without disclosure of its contents to Lynn, requires reversal of the order of the district court.

In view of our holding, we need not decide the question whether tenure review files, and more particularly peer evaluations, are privileged in academic Title VII cases generally. We do wish, however, to provide the district court with some guidance on the question since that court will be required, once again, to consider the issue of Lynn's right to obtain her tenure review file, upon remand.[13]

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13. While the remainder of our discussion is confined to future use of the tenure review file, we also note for the district court's benefit upon remand, that some of the evidence previously discussed in connection with plaintiff's *prima facie* case is also relevant with respect to her efforts to establish that the University's articulated reason was "a pretext or discriminatory in its application." Evidence is not necessarily submitted solely to establish a *prima facie* case or to show pretext or discriminatory application; it may

When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interest in confidentiality, *i.e.*, in maintaining the effectiveness of its tenure review process, and the need which Title VII plaintiffs have for obtaining peer evaluations in their efforts to prove discriminatory conduct. *Jepsen v. Florida Bd. of Regents,* 610 F.2d 1379, 1384—85 (5th Cir. 1980); *Keyes v. Lenoir Rhyne College,* 552 F.2d 579,581 (4th Cir.), *cert. denied* 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977). In making that determination it is necessary to consider the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in educational employment.

The Fourth Circuit has suggested, *Keyes v. Lenoir Rhyne College,* 552 F.2d 579, and the Fifth Circuit has held, *Jepsen v. Florida Bd. of Regents,* 610 F.2d 1379, that when evaluations serve as the alleged basis for the University's decision to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file and that in such cases the evaluations must be provided to the plaintiff. In *Keyes,* the Fourth Circuit denied plaintiff's request for all peer evaluations for the entire faculty of the College. The court noted, however, that

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be used, when relevant, to establish either of plaintiff's steps in the *McDonnell Douglas* process or both. For example, general statistical data is relevant to a showing of discriminatory application, and thus may be used at the third step in the *McDonnell Douglas* process, *McDonnell Douglas,* 411 U.S. at 805, 93 S.Ct. at 1825, as well as at the *prima facie* step.

"if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them" to prove her case. 552 F.2d at 581.[14] The Fifth Circuit, in *Jepsen,* found the reasoning in *Keyes* to be "persuasive," and held that where "the university defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex," a plaintiff is entitled to obtain the evaluations. 610 F.2d at 1384.[15]

The University claims that Lynn was denied

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14. *Keyes* was a class action suit brought by a class plaintiff on behalf of the female faculty of Lenoir Rhyne College. The class plaintiff alleged sex discrimination in salaries and promotions. To show that the College's explanations for variances in salaries and promotions were pretextual, she requested, *inter alia,* peer evaluations for all members of the College faculty. It was in this context that the Fourth Circuit held that the evaluations need not be disclosed.

Keyes, the class Plaintiff, also had an individual complaint against the College. She alleged that the College's decision to deny her request for an extension of tenure was made on the basis of sex. The College claimed that its denial was based solely on the fact that she was too old. The Fourth Circuit did not address the question of whether Keyes was entitled to her own evaluations. Nor did the Fourth Circuit reveal whether she in fact received those evaluations.

15. We believe the word "solely" was used for the purpose of reflecting accurately the use that the University actually made of the files in the case before the court. We do not believe the Fifth Circuit intended to limit its ruling to cases in which the university considered only faculty evaluations and to exclude from the operation of its rule cases in which the university considered other materials as well as faculty evaluations. We understand the rule which the court set forth to mean that the plaintiff must be permitted to obtain evaluations whenever the university's decision is based on them, in whole or in part.

tenure because of deficient scholarship. Since its view of Lynn's ability is based, in large part, on the content of the tenure review file, including peer evaluations, the University is defending, in essence, on the ground that its tenure decision with respect to Lynn was based on non-discriminatory peer evaluations. Under *Jepsen* and *Keyes,* disclosure of the evaluations would be required. We agree fully with the views expressed by the Fourth and Fifth Circuits in that respect. However, in Lynn's case it is not necessary to rely on the right of academic plaintiffs generally to obtain evaluations when a university has used the documents in reaching its decision. The record before us reveals that the University has far less interest in the confidentiality of Lynn's tenure review file than in the ordinary case in which disputes over such files arise.[16]

16. Whether or not a university may adopt procedures which provide for full disclosure of the contents of the evaluations but protect th identities of individual evaluators is a question which we need not determine here. However, in this connection we note a decision of the Fifth Circuit which was decided after we issued our initial opinion. In *In re Dinnan,* 661 F.2d 426 (5th Cir. 1981), the court held that when a plaintiff contends that she was denied promotion on the basis of sex discrimination, a professor who participated in the tenure review process may be compelled to testify as to how he voted and his reasons therefor . The court said:

> No one compelled Professor Dinnan to take part in the tenure decision process. Persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has

Lynn received summaries of the comments of her evaluators as do all University academic personnel when they so request.[17] Unlike the ordinary plaintiff, however, Lynn knew the names of her evaluators due to the fact that Dr. Nicole Marzac, apparently in violation of the University rule, provided her with a copy of the minority report.[18] Moreover, Marzac provided Lynn with copies of letters written by Marzac to Chancellor Aldrich and to Professor Stephen, as well as the minutes of the meeting of the tenure review committee.[19] The final pieces of in-

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> nothing to fear. We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.

At 432

17. University of California Rule 195—20, entitled "Access to Academic Personnel Records," protects individuals' rights to privacy and sets forth when, and to whom, academic records may be disclosed. The rule provides that an individual may inspect all documents except "confidential documents." Those deemed confidential are: (a) letters of evaluation submitted in confidence, (b) letters from the chairperson setting forth a departmental recommendation regarding appointment, promotion, merit increases, appraisal, reappointment, nonreappointment, or terminal appointment, or (c) reports, recommendations from ad hoc and standing committees. Rule 195—20b (1) The rule also provides that an individual has the right to oral or written summaries of "confidential documents." Rule 195—20b.(2).

18. Dr. Marzac authored the minority report. The minority report represents the views of those who disagreed with the committee's recommendation that tenure be denied.

19. The letters and the minutes were subject to the confidentiality rule of the University and were not to be disclosed.

formation undermining the confidentiality of the file were provided, at trial, by Professor Slim, chairman of the tenure review committee. Professor Slim was cross-examined on the proceedings that were conducted by the tenure review committee, and on the majority report. His testimony provided Lynn with further knowledge as to the personal views of the committee members.

Although it cannot be determined with certainty which members of the committee, or evaluators, made which comments, the documentary evidence in Lynn's possession, in addition to Marzac's description of that evidence in her deposition filed with the district court and Slim's testimony at the trial make it possible to attribute specific views and attitudes to specific evaluators. Accordingly, the confidentiality of Lynn's file has been substantially diminished as a result of the information already in her possession.

The district court's determination as to whether and when Lynn may have access to her tenure review file for purposes related to a new trial should be reached in light of the strong interest which Lynn continues to have in determining whether the contents of the file will assist her in proving her case (and particularly in establishing that the University's articulated reason for denial of tenure was "a pretext or discriminatory in its application"), and the minimal interest that the University now has in preserving the vestiges of confidentiality in the file.[20]

20. Without suggesting that an *in camera* review would ever be appropriate in determining a plaintiff's entitlement to a tenure review file, we note that, upon remand, the district court should determine any questions relating to Lynn's right to obtain her tenure review file without considering the nature of its contents or making any *in camera* review thereof.

The order of the district court is reversed and remanded for proceedings consistent with this opinion.

ALARCON, Circuit Judge, concurring.

I concur in the opinion of the court insofar as it appears to hold the district court may have violated Lynn's right to due process by admitting the contents of the tenure review file into evidence "for the purpose of assisting it in making factual determinations or to evaluate other evidence" (slip opinion p. 4751) after denying Lynn's request to examine these records because they contain privileged and confidential matter.

The balance of the court's opinion is obiter dictum which is not only unnecessary to the disposition of this matter, but fails to give due consideration to the problems which will flow from a requirement that the confidentiality of peer review evaluation must be breached in every case in which a teacher's ability is based, in large part, on the content of the peer review file, without regard to protection of the privacy of the commentators.

I would exercise judicial restraint and leave to another day the consideration of these seductive issues, when the questions are squarely before this court on a record which is otherwise free of reversible error.

Appendix C

Filed Dec. 28, 1981
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 79-3384

THERESE BALLET LYNN, and all others similarly situated,

Plaintiffs Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant-Appellee.

ORDER

Before: ALARCON, FERGUSON, and REINHARDT, Circuit Judges:

It is ordered that footnote 16, as set forth in the Amended Opinion filed on December 18, 1981, be amended to read as follows:

> Whether or not a university may adopt procedures which provide for full disclosure of the contents of the evaluations but protect the identities of individual evaluators is a question which we need not determine here. *But, compare In re Dinnan,* Nos. 80-7432, 80-7441 (5th Cir.* 11/16/81) *with Gray v. Bd. of Higher Education,* 50 U.S.L.W. 2307 (S.D.N.Y., Nov. 9, 1981).

The motion of Oliver A. Johnson and Harold W. Horowitz for leave to file brief as amici curiae is gran-

ted.

The motion of the Board of Trustees of the Leland Stanford Junior University for leave to file briefs as amicus curiae is denied. Judge Alarcon would grant this motion.

The petitions for rehearing are denied. Judge Alarcon would grant the petitions for rehearing.

The full court has been advised of the suggestion for rehearing en banc, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. F. R. App. P. 35(b). The suggestion for rehearing en banc is rejected.

Appendix D.

Filed Jan. 14, 1982
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 79-3384
D.C. No.CV 77-1716-DWW

THERESE BALLET LYNN, and all others similarly situated,

Plaintiffs-Appellants,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant-Appellee.

ORDER

Before: ALARCON, FERGUSON, and REINHARDT, Circuit Judges:

Appellee's petition for rehearing was denied by the panel. At that time the panel added a footnote to its opinion and Judge Alarcon filed a concurring opinion. Thereafter, appellee's first request for rehearing en banc was circulated to the active judges of the court and no active judge having requested a vote thereon the request was rejected. However, the added footnote was amended. The mandate inadvertently was not issued in a timely manner and appellee subsequently filed a second petition for rehearing and request for rehearing en banc, in substance rearguing the points set forth in its first petition. The mandate then issued.

The second petition for rehearing and request for rehearing en banc being substantially the same as the first,

and being filed belatedly, is treated as a request to recall the mandate. That request is denied.

Judge Alarcon would grant the request to recall the mandate.

Appendix E

Central District of California
No.CV 77-4736-DWW
May 1, 1979

United States District Court
for the Central District of California

THERESE BALLET LYNN,
Plaintiff,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
Defendant.

Counsel:
John G. Sobieski, Lada Marx, Los Angeles, California for Plaintiff. Donald L. Reidhaar, John F. Lundberg, Christine Helwick, Kate K. Alderman, Berkeley, California, for Defendant.

WILLIAMS, D.J.: Plaintiff is a female native of France who was employed as an assistant professor of French by the University of California at Irvine until June 30, 1977. That date marked the end of her one-year terminal contract granted on June 30, 1976, after she had been denied tenure. Plaintiff filed charges with the Equal Employment Opportunities Commission but conciliation efforts were unsuccessful and for the purposes of this action, it is conceded that plaintiff has complied with the procedural requirements of 42 USC § 2000e-5 (f). This Court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964 as amended. It is not disputed that the University of California was made subject to the provisions of the Title VII on and after March 24,

1972.

Lynn became a citizen of the United States and gained a portion of her education in this country and had prior teaching experience at the University of Tennessee and at Knoxville College. She was awarded a Ph.D. degree by the University of Illinois in 1971. She has published several scholarly papers and one book in her field. Commencing July 1, 1969, Lynn was appointed a lecturer at U.C. Irvine and served as such until July 1, 1971 when she was appointed assistant professor Step. I. In 1974 she advanced to assistant professor Step II where she served until her termination. In this action she contends that the defendant refused her tenure and terminated her employment as a consequence of its policy of discrimination toward women and persons of foreign origin. Lynn contends that at the time of her hiring, she was appointed to a step lower than that given to a less qualified male and that she was subjected to allegedly unfavorable work conditions such as (a) heavy assignment of composition courses rather than literature courses; (b) heavy assignment of Monday, Wednesday and Friday classes; and (c) a light assignment of desired graduate courses. Plaintiff testified that the teaching of composition courses requires more preparation by the instructor and is less challenging than the teaching of literature courses; that the requirement that she teach Monday, Wednesday and Friday courses rather than on other days of the week reduces the time she would have on weekends to pursue research and that the denial to her of the privilege of teaching graduate seminars lessens her ability to broadly develop her teaching skills and diminishes the prestige she would otherwise have before students.

In answer to this, the university maintains that it had no intention of acting discriminatorily in assigning composition courses to plaintiff; that it felt that an instructor who was a native of France could more effectively teach the language and inject a truer cultural communication than could a person born in this country; that the plaintiff had never before the filing of this action complained to the administration of the days in the week that she was scheduled to teach and that in fact, the scheduling had been her choice.

Over the years university administrators have shown a lack of concern for the need for minority and female faculty members, and such indifference persists. Even though the University of California at Irvine maintains an Affirmative Action Program, statistical summaries still display an underutilization of these groups. The instant case requires careful scrutiny, since it is easy for a university administration, while maintaining an outward posture of equal opportunity, to decline to hire or promote members of minorities or females on the pretext that those eventually given positions were the best-qualified.

The university denies in this instance that the eventual termination of Lynn was the result of discrimination on its part and alleges that during the years of her employment it had obtained extramural critiques of her writings by objective scholars several of whom, claimed that she lagged in self-development; and that her research and scholarship were not sophisticated and was characterized by her strong feminist attitudes. Scholars who reviewed her work criticized the quality of her scholarship because they detected a "trendy" flavor in the

themes she tried to develop; they described it as "popularization."

Lynn's field of studies is Medieval French Literature. Her research seems to be heavily influenced by her concern with the role of women. The criticism leveled at her work by scholars and administration officials appears to reflect their disdain of this as a topic of substance in a scholarly work. I find that their lack of enthusiasm for her efforts may stem from their belief that women's studies was an unworthy topic for Lynn to pursue. However, this complaint could be lodged against a male professor who felt moved to develop the topic. An individual's topic of study is not on the list of items that 42 U.S.C. 2000e-2 proscribes discrimination concerning. For this court to say to a university "you cannot deny tenure on the grounds that you do not like the scholar's subject of study" is the equivalent of ordering that the tenure committee must exercise its professional scholarly judgment in a particular way. This gets very near a First Amendment problem. Free exercise of scholarly judgment is a part of academic freedom. *Keyishian v. Board of Regents of New York,* 385 U.S. 589, 603 (1967); *University of California Regents v. Bakke,* 57 L.Ed. 750, 785 (1978).

Plaintiff's statistics claim that since its founding, Irvine has granted tenure in the School of Humanities to 26 men and only three women—the last woman tenured was in 1972.

The professional career of Professor Lynn at Irvine was characterized by numerous "warnings" to her that her scholarship was less than outstanding. Periodically since 1972 Mrs. Lynn underwent reviews of her work,

some by extra mural evaluators jointly selected by Lynn and the administration. At one point Lynn was given sabbatical leave for the purpose of permitting her time to strengthen her research efforts so she would improve her chances of gaining the approval of her review board. Finally the department recommended denial of tenure to her and this was sustained by the Dean of the school. Then in 1976 the Chancellor notified her of the rejection. That marked the first time Lynn complained of sex discrimination.

I have reviewed the evidence in this case in a most painstaking manner and cannot conclude that plaintiff has borne her burden of proving that her dismissal was the product of sex discrimination or discrimination because of her place of origin. There is absolutely no credible evidence to support the latter. There are some reasonable inferences which might support the former, but these melt into insignificance when weighed against the reasons defendant gives for the termination. Throughout all this assessment of the evidence, I have been mindful of the pretexts some employers use to discriminate against minorities. But here, the university seems to have made a good faith determination of reasons for denying Lynn tenure, not colored by a desire to refuse this employment security because Lynn was female.

While being conscious of the duty of the trier of fact to carefully sift the evidence for solid inferences of discrimination, I am also mindful of the ever-present danger that a judge in a Title VII case might too easily be tempted to substitute his judgment for the reason for a termination, over the considered judgment of scholars who are learned in the very field of endeavor that the applicant for tenure claims expertise.

A fair conclusion compels a finding that Lynn was not given disparate treatment in teaching assignments or work conditions, and that the decision to deny her tenure was based only upon a composite academic conclusion that the quality of her scholarship had slipped to a level not acceptable to meet the stringent demands of the university.

Judgment is ordered for the defendant. Defendant is directed to prepare proposed findings of fact and conclusions of law and a form of judgment by May 15, 1979.

Appendix F

Clerk, Central District of California
Filed May 30, 1979

United States District Court
for the Central District of California

No. CV 77-4736 DWW

THERESE BALLET LYNN, and all other persons similarly situated,

Plaintiffs,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant.

FINDINGS OF FACT

1. Plaintiff is a naturalized citizen and a native of France. She was employed by defendant as a Lecturer in the French and Italian Department on the University of California, Irvine campus beginning September 1969, for two successive academic years. In July, 1971, after receipt of her Ph.D., plaintiff was appointed as an Assistant Professor Step I, off-step at a salary of an Assistant Professor Step III. In July of 1974 plaintiff was promoted to Assistant Professor Step II with an off-step salary of Assistant Professor Step III. Plaintiff was employed pursuant to two year contracts until June 30, 1976, when plaintiff was offered and accepted a one year terminal appointment. The contracts of employment as an Assistant Professor did not provide for continuity of employment.

2. Defendant, The Regents of the University of California (hereafter University) is a corporation duly organized and existing under and by virtue of article IX, section 9 of the California Constitution. It is authorized

and empowered by that section of the California Constitution to administer a public trust known as the University of California, of which the University of California, Irvine is one campus.

3. Plaintiff's action is based upon the Civil Rights Act of 1964, Title VII, as amended, 42 United States Code section 2000e, *et seq.* Plaintiff claims that defendant discriminated against plaintiff on the basis of sex and French national origin. Plaintiff seeks reinstatement to a tenured position, back pay, broad remedial injunctive relief, and attorney's fees.

4. Defendant maintains a tenure system for certain academic positions, including that occupied by plaintiff, requiring that tenure be obtained within eight years, or that such employment be terminated. Prior to tenure review other academic reviews, including a merit salary review or reviews and a mid-career review are conducted. Both forms of review were conducted during plaintiff's employment. In both the 1972-73 and the 1973-74 academic year plaintiff was reviewed by the University internally, and by separate sets of extramural evaluators. After each review plaintiff was warned that her research was deficient.

5. During the 1972-73 review the Department of French and Italian recommended an accelerated merit salary increase for plaintiff from Assistant Professor Step I to Assistant Professor Step III; however, extramural evaluators, one selected by plaintiff and one selected by the University, judged plaintiff's scholarly work to be poor. In January of 1973 the Budget Committee of the Academic Senate, or as it came to be known the Academic Personnel Committee, requested further review; further review was conducted internally. The Academic Senate is an academic peer governing body, the Budget Committee being one of the standing committees which has jurisdiction, amongst other mat-

ters, over academic promotions. Accelerated promotion was denied by the Budget Committee after review.

6. A mid-career review was conducted during the 1973-74 academic year. New extramural evaluators were selected and reviewed plaintiff's scholarly work. After the mid-career review was conducted, plaintiff was warned that the quality of her scholarly research was considered below standards of the University of California. She requested and spoke to various members of the Department of French and Italian regarding the deficiencies in her scholarly work.

7. During plaintiff's employment she received letters from the Department Chairman indicating the conditions under which plaintiff was employed, namely, that she was employed on a two year contract which would terminate of its own force and that she was subject to tenure review pursuant to rules of the Academic Personnel Manual of the University of California. Those rules were attached to the letters provided plaintiff, and were otherwise available to her in the offices of the Department of French and Italian. At the time of initial employment plaintiff received a copy of the Faculty Handbook, May, 1968 which described terms and conditions of academic employment, including the tenure system.

8. During the Fall of 1974 and the Winter of 1975, plaintiff was given sabbatical leave for the explicit purpose of improving her scholarly research.

9. The University has a tenure review system for promotion in which the excellence of a candidate's research, teaching, University and public service are judged. In order to receive candid evaluations from peers the reports of the various levels of review are confidential, as are the identities of an ad hoc review committee and the identities of extramural evaluators selected by the University. There are five levels of review in the tenure review pro-

cess; each is independent of the other. The levels of review including that of the individual department of which the tenure candidate is a member, the dean of the school of which the department is a part, an ad hoc committee review, a review by the Budget Committee of the Academic Senate, review by the Office of Academic Affairs, and finally, review and decision by the Chancellor of the University of California, Irvine.

10. Plaintiff's tenure review was postponed for one year in order to provide plaintiff ample time to improve her research. During the Spring of 1975, the Chairman of the Department of French and Italian notified plaintiff that in the following year tenure review would be conducted. Plaintiff was asked for the names of extramural scholars to review plaintiff's scholarly work and other documentary evidence with regard to promotion to tenure. Each scholar named by plaintiff was contacted. The Chairman of the Department of French and Italian also contacted other extramural scholars for the purpose of having them review plaintiff's scholarly work, as well as, other documentary evidence for promotion to tenure. Her work was favorably commented upon by a majority of these scholars. Plaintiff reviewed and approved the index and non-confidential material contained in the academic review file; the review and approval were for purposes of completeness and accuracy. The Department of French and Italian conducted two meetings with regard to plaintiff's tenure review; junior faculty and graduate students were consulted. The majority recommendation of the tenured members of the Department was that tenure be denied. The Dean of the School of Humanities also recommended denial of tenure. An ad hoc review committee consisting of two medieval scholars, one medievalist in English literature, a member of the Irvine faculty and a student was formed. The majority view of the ad hoc review committee was that

tenure ought to be denied. At each subsequent level of review, including Budget Committee review and review by the Office of the Vice Chancellor of Academic Affairs, the recommendation was for denial of tenure. Finally, the Chancellor denied tenure to plaintiff.

11. Tenure was denied and plaintiff informed by letter from the Chancellor dated June 28, 1976, and offering plaintiff a terminal year appointment from July 1, 1976 through June 30, 1977.

12. The review of plaintiff to tenure was in accordance with the applicable rules of the Academic Personnel Manual.

13. Plaintiff requested reconsideration of the decision to deny tenure, and on the basis of evidence presented, the Budget Committee denied such reconsideration.

14. On March 3, 1976, plaintiff submitted a five page written complaint to the Committee on Privilege and Tenure claiming discrimination and harassment in her employment on the University of California, Irvine campus.

15. The Committee on Privilege and Tenure is a committee of peers constituted by the Academic Senate of the Irvine campus. It has jurisdiction to make investigations, and in its discretion, to hold hearings on any matter relating to personal, departmental, or University welfare.

16. The Committee on Privilege and Tenure conducted an investigation and found neither discrimination nor harassment of plaintiff.

17. Plaintiff made further complaint to a Committee on Privilege and Tenure subsequent to her original complaint, and the second Committee found no reasons to reopen the investigation.

18. Although plaintiff complained that part of the disparate treatment of her was assignment to Monday,

Wednesday and Friday classes, her own testimony was that she did not request relief from the schedules prepared by Department Chairman.

19. Although the plaintiff complained about having to teach an inordinate number of composition courses, and although plaintiff testified that teaching such courses requires more preparation and is less challenging than the teaching of literature courses, it was felt that as a native of France plaintiff could more effectively teach the language courses and provide a more enriching cultural experience for students.

20. Although plaintiff complained that she did not teach enough graduate seminars, plaintiff taught the exact same number of graduate seminars during the years that she was employed as did the male that plaintiff compared herself with, and taught one more graduate seminar than the male who was Department Chairman during the longest period of time plaintiff was employed by the University of California, Irvine.

21. During her employment plaintiff was warned numerous times that her scholarship was less than outstanding.

22. Plaintiff was not treated disparately in teaching assignments or working conditions; she was denied tenure based upon the composite academic conclusion that the quality of her scholarship was at a level not acceptable to the stringent demands of the University.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964, as amended. Title VII became appliable to defendant on March 24, 1972.

2. Plaintiff has complied with the precedural requirements of 42 United States Code section 2000e-5(f).

3. Plaintiff has failed by the weight of evidence to make out a *prima facie* case of discrimination on the basis of sex and national origin resulting in her failure to obtain tenure in the Department of French and Italian at the University of California, Irvine. Specifically, plaintiff has failed to make out a *prima facie* case under the Civil Rights Act of 1964, as amended, Title VII, 42 United States Code section 2000e, *et seq.*

4. Even though the plaintiff has failed to make out a *prima facie* case, defendants have articulated legitimate and non-discriminatory reasons for not granting plaintiff tenure on the University of California, Irvine campus.

5. The complaint should be dismissed in its entirety and judgment should be entered in favor of defendant and against plaintiff.

Appendix G

Central District of California
May 30, 1979

United States District Court
for the Central District of California

No. CV 77-4736-DWW

THERESE BALLET LYNN, and all other persons similarly situated,

Plaintiffs,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant.

JUDGMENT

WILLIAMS, D.J.: This action came on regularly for trial on Monday, March 19, 1979. Lada S. Marx and John G. Sobieski appearing for plaintiff, Therese B. Lynn, and John F. Lundberg and Christine Helwick appearing for defendant, The Regents of University of California. Evidence, both oral and documentary, having been presented, the cause having been argued and submitted for decision and the Court having caused to be made and filed herein its written Findings of Fact an Conclusions of Law.

IT IS ORDERED, ADJUDGED, AND DECREED that defendant have judgment, plaintiff's complaint be dismissed, and that defendant recover from plaintiff its cost of suit herein.

Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2005

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

THERESE BALLET LYNN,
Cross-Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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No. 81-2005

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

THERESE BALLET LYNN,
Cross-Petitioner,

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

Cross-Respondent, The Regents of the University of California (hereafter "University"), respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case, reported at 656 F.2d 1337, on the basis that all significant issues are raised on the University's petition seeking review of that same opinion.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE CROSS-PETITION AND WHY IT OFFERS NO GROUNDS FOR DENIAL OF THE UNIVERSITY'S PETITION

1. The First Question Presented by the Cross-Petition Is Already Raised by the University's Petition

On March 26, 1982, the University filed a Petition for Writ of Certiorari seeking review of the important, unsettled question of whether a university being sued by a plaintiff denied tenure can assert a qualified evidentiary privilege to protect the identities of academic peers submitting confidential evaluations of the quality of the plaintiff's work. (*Regents of the University of California v. Therese Ballet Lynn*, No. 81-1962.) Respondent Lynn raised no opposition to the granting of certiorari on the University's petition. Instead, she filed this Cross-Petition for Writ of Certiorari raising as a first issue the same question presented by the University's petition although making a number of arguments against an evidentiary privilege. There was no need for the cross-petition as respondent is "entitled under our precedents to urge any grounds which would lend support to the judgment below. . . ." (*Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977).) Thus, the first question presented by the cross-petition amounts to no more than support for this Court's review of the issue raised by the University's original petition.

2. The Second Question Presented Is Settled Contrary to Cross-Petitioner

The second issue presented by the cross-petition claims that the Court of Appeals improperly remanded the case and should have ordered judgment entered in Lynn's favor. The basis for the Ninth Circuit's reversal and remand was that the trial court had made supposedly inappropriate rulings on the evidence, including denying plaintiff access to her complete file. Where such improper rulings are made, the appropriate remedy on appeal is to instruct the trial court as to the proper legal standard and to remand. *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Jackson v. U.S. Steel Corp.*, 624 F.2d 436 (3rd Cir. 1980). Moreover, the University did not produce the confidential documents because the trial court found they were privileged. And judgment against the University because of its refusal to produce them would be contrary to the rule that a party is not to be prejudiced by the assertion of a privilege. (See, e.g., *United States v. Tapia-Lopez*, 521 F.2d 582 (9th Cir. 1975).) Thus, the cross-petitioner's second question was properly decided by the Court of Appeals and raises no issue requiring the exercise of this Court's supervisory powers.

3. The Facts Stated in the Cross-Petition Are Not Grounds for Denying the University's Petition

While Lynn's cross-petition raises the question of whether a qualified privilege arises generally, her "Statement of the Case" focuses on assertions that confidentiality was used to shield improprieties in this particular case.

These assertions may suggest that this is not an appropriate case to resolve the more general legal issue, but they distort the record:

(a) Lynn states that Professor Nicole Marzac, the author of a minority report opposing the negative conclusions of an ad hoc faculty committee charged with reviewing Lynn's scholarship, gave weighty and uncontradicted testimony as to allegedly sexist remarks in committee deliberations. In fact:

(1) Professor Harry Colin Slim, a member of the ad hoc committee, and a veteran of other ad hoc committees, testified that there was nothing unusual about the tenure review of Professor Lynn, and that Professor Marzac was incorrect in her characterization of what happened in the committee deliberations. (R.T. 378-81.)

(2) Professor Carol Whalen, a female member of the ad hoc committee and a veteran of other ad hoc committees, testified that Professor Lynn was treated no differently in the ad hoc evaluation than other candidates undergoing tenure review. (R.T. 231.)

(3) Professor Grover Stephens, the Chair of the faculty Committee on Privilege and Tenure, which evaluated Professor Lynn's complaints of discrimination and which had access to all participants in the review process and to the complete contents of her academic personnel file, testified that after a full investigation the committee determined that Professor Lynn's complaints of sexism were unfounded. (R.T. 577-582; Ex. 19 and 28.)

(4) Professor Marzac's testimony confirmed that she earlier had to be disciplined for another breach of faculty ethics, that of making prior disclosure of the contents of an examination to one of her students. (Marzac deposition, Ex. ...., p. 69.)

(b) Lynn also suggests that another faculty member at the Irvine campus, Professor Laborde, was coerced into not testifying by threats of reprisal under the University's rules of confidentiality. In fact:

(1) Professor Laborde testified at some length at the trial (R.T. 418-39) and even expressed her opinion that Professor Lynn should have been granted tenure. (R.T. 433.)

(2) In response to Professor Laborde's request for immunity from University discipline should she reveal the confidential deliberations of her department, the Court was informed by University counsel that the Irvine campus did have a disciplinary system to enforce the Faculty Code of Ethics and that Professor Laborde's testimony could possibly subject her to that process. (R.T. 431.)

(3) The Court then advised Professor Laborde that she might have a good defense based on Title VII to any disciplinary action, but that she would have to make the decision of whether or not to breach the University's ethical rules. (R.T. 433.)

(4) No objection to her testimony was made by University counsel, no evidentiary ruling was made, and no offer of proof was made by plaintiff's counsel

as to what, if any, testimony Professor Laborde would give were she to breach confidentiality.

(5) Professor Laborde did not leave the stand, but continued to testify including giving testimony as to the substantive content of her minority report. (R.T. 433-438.)

CONCLUSION

For these reasons, the Cross-Petition for a Writ of Certiorari should be denied. We urge this Court to act favorably on the University's petition.

Respectfully submitted,

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GARY MORRISON
CHRISTINE HELWICK
Counsel for Cross-Respondent